Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977
No. 77-1283

TOWNSHIP OF MIDLAND, a Municipal Corporation in Midland County, Michigan and ROBERT B. CHATTERTON,
Appellants,

v

MICHIGAN STATE BOUNDARY COMMISSION,
Appellee,

and

CITY OF MIDLAND, a Municipal Corporation,
Intervening Defendant-Appellee,

et al

On Appeal from the Supreme Court of the State of Michigan

MOTION TO DISMISS OR AFFIRM

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TOWNSHIP OF NOVI,

Appellant,

and

W. B. CHASE and CHASE MANOR FARMS, INC., a Michigan corporation and MARY ANN ODERMAN,

Appellants,

v

STATE OF MICHIGAN, DEPARTMENT OF TREASURY, STATE BOUNDARY COMMISSION,

Appellee,

and

CITY OF NOVI, a municipal corporation,

Appellee,

and

GREGORY I. DONOVAN, et al.,

Intervening Defendants.

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On Appeal from the Supreme Court of the State of Michigan

MOTION TO DISMISS OR AFFIRM

The Appellee Michigan State Boundary Commission, by and through Frank J. Kelley, Attorney General for the State of Michigan, Robert A. Derengoski, Solicitor General for the State of Michigan, Milton I. Firestone and Craig Atchinson, Assistant Attorneys General for the State of Michigan, moves the Court to dismiss the appeal herein for the reason that the appeal does not present a substantial federal question or in the alternative to affirm the judgment of the Supreme Court of Michigan on the ground that it is manifest that those questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.

THE STATE STATUTORY PROVISION INVOLVED AND THE NATURE OF THE CASE.

A. The State Statutory Provision

The sole issue presented by this appeal is whether a statutory classification allowing the annexation of territory to a city without a referendum where 100 persons or less reside in the area approved for annexation violates the federal constitutional guarantee of equal protection of the laws.

Michigan's home rule cities act, 1909 PA 279; MCLA 117.1 *et seq;* MSA 5.2072 *et seq*, was amended by 1970 PA 219, MCLA 117.9; MSA 5.2088 so as to provide *inter alia* that petitions or resolutions proposing annexations of territory to cities would be filed with a state agency known as the State Boundary Commission. The amended statute provides that if an annexation is approved and if, on the date the petition or resolution was filed, 100 persons or less resided in the area approved for annexation, the State Boundary Commission's order approving the annexation of territory to the city would not be subject to a referendum and the annexation would become effective without approval by the electorate. However, if an annexation was approved and if, on the date the petition or resolution was filed, more than 100 persons resided in the area approved for annexation, the statute provides for a 30-day period within which a referendum petition may be filed with the Commission. If a valid petition was not filed within the 30 days or if the majority of the electorate voting on the question approved the annexation, the annexation is effective on a date set by order of the Commission. Otherwise, the annexation does not take effect.

B. The Proceedings Below

The State Boundary Commission, acting upon various resolutions adopted by city councils proposing annexations of territory, did approve annexations of territories to the City of Midland, the City of Brighton, and the City of Novi. In each case, less than 100 persons resided in the area proposed to be annexed. The respective townships commenced action in the Circuit Court for the County of Ingham attacking the proposed annexations and raising numerous questions relating to alleged violations of state law, the state constitution, and the instant federal constitutional question. The cases were consolidated during the appeal process. The Michigan Supreme Court unanimously upheld the authority of the State Boundary Commission and found that the contentions of the townships pertaining to alleged violation of the Federal Constitution, state constitution, and state law were without merit. Specifically, the Michigan Supreme Court, after careful examination of federal case law, concluded that there had been no violation of the equal protection guarantees afforded by the Fourteenth Amendment to the United States Constitution and stated:

> "We are of the opinion that the challenged classification bears a substantial relation to the object of the legislation: providing a means appropriate to the resolution of disagreements concerning annexation of territory to a city." *Midland Township* v *Boundary Commission*, 401 Mich 641, 666-667; 259 NW2d 326, 338-339 (1977).

It is from that final decision of the Michigan Supreme Court that the appellants have filed the instant appeal.

II.

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL QUESTION.

In conjunction with the contention of the townships that the statute in question denies equal protection of the laws to persons residing in an area containing 100 persons or fewer who are denied a referendum on a Commission order although a referendum is required where more than 100 persons reside in the area, the Michigan Supreme Court observed that such a contention ignores the nature of annexation proceedings and stated:

> ". . . No city, village, township or person has any vested right or legally protected interest in the boundaries of such governmental units. The Legislature is free to change city, village and township boundaries at will. This was settled for federal constitutional purposes in *Hunter* v *Pittsburgh*, 207 US 161, 178-179; 28 S Ct 40; 52 L Ed 151 (1907), and the principles there established have been observed in subsequent litigation in the courts of this and other states. See *Village of Kingsford* v *Cudlip*, [258 Mich 144; 241 NW 893 (1932)], p 148. Similarly, see *Lansing School District* v *State Board of Education*, 367 Mich 591; 116 NW2d 866 (1962); *The Detroit Edison Co* v *East China Twp School Dist No 3*, 247 F Supp 296 (ED Mich, 1965), aff'd 378 F2d 225 (CA 6, 1967); 56 Am Jur 2d, Municipal Corporations, § 50, p 108 and § 57, p 113." *Midland Township* v *Boundary Commission*, 401 Mich 641, 664-665; 259 NW2d 326, 337 (1977).

Although appellants suggest that this Court's holding in *Hunter* v *Pittsburgh*, *supra*, is nothing more than dicta, this

Court's prefatory remarks to its discussions of important principles relating to municipal corporations provide an important insight as to why no substantial federal question is raised by the present appeal. This Court stated:

> "This court has many times had occasion to consider and decide the nature of municipal corporations, their rights and duties, and the rights of their citizens and creditors. Maryland use of Washington County v. Baltimore & O. R. Co. 3 How. 534, 550, 11 L. ed. 714, 721; East Hartford v. Hartford Bridge Co. 10 How. 511, 533, 534, 536, 13 L. ed. 518, 527-529; United States v. Baltimore & O. R. Co. 17 Wall. 322, 329, 21 L. ed. 597, 600; Laramie County v. Albany County, 92 U.S. 307, 308, 310-312, 23 L. ed. 552-555; Tippecanoe County v. Lucas, 93 U.S. 108, 114, 23 L. ed. 822, 824; New Orleans v. Clark (Jefferson City Gaslight Co. v. Clark) 95 U.S. 644, 654, 24 L. ed. 521, 522; Mt. Pleasant v. Beckwith, 100 U.S. 514, 524, 525, 531, 532, 25 L. ed. 699, 701, 703, 704; Meriwether v. Garrett, 102 U.S. 472, 511, 26 L. ed. 197, 204; Kelly v. Pittsburgh, 104 U.S. 78, 80, 26 L. ed. 658, 659; Forsyth v. Hammond, 166 U.S. 506, 518, 41 L. ed. 1095, 1100, 17 Sup. Ct. Rep. 665; Williams v. Eggleston, 170 U.S. 304, 310, 42 L. ed. 1047, 1049, 18 Sup. Ct. Rep. 617; Covington v. Kentucky, 173 U.S. 231, 241, 43 L. ed. 679, 683, 19 Sup. Ct. Rep. 383; Worcester v. Worcester Consol. Street R. Co. 196 U.S. 539, 549, 49 L. ed. 591, 595, 25 Sup. Ct. Rep. 327; Atty. Gen. ex rel. Kies v. Lowrey, 199 U.S. 233, 50 L. ed. 167, 26 Sup. Ct. Rep. 27. It would be unnecessary and unprofitable to analyze these decisions or quote from the opinions rendered. We think the following principles have been established by them and have become settled doctrines of this court, to be acted upon wherever they are applicable. . . ." *Hunter* v *Pittsburgh*, 207 US at 177-178.

Accordingly, the Michigan Supreme Court was properly guided by the words of this Court in *Hunter, supra,* when this Court acknowledged that the legislature may constitutionally change municipal boundaries without an election.

> ". . . Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise in the unaltered or continued existence

> of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State, and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it." *Hunter* v *Pittsburgh, supra,* p 178-179. Quoted with approval in *Midland Township* v *Boundary Commission, supra,* p 665-666; 338.

Two tests are traditionally applied in examining statutory classifications for violation of the constitutional guarantee of equal protection. In ordinary cases not involving suspect classifications or the alleged infringement of a fundamental interest the classification is upheld if it bears a rational relationship to a legitimate state purpose. *McGowan* v *Maryland,* 366 US 420 (1961). However, if the statute imposes a suspect classification or a classification which infringes on a fundamental interest, it must be closely scrutinized and may be upheld only if it is necessary for the furtherance of a compelling state interest. See, e.g., *Kramer* v *Union Free School District,* 395 US 621 (1969). Appellants in the instant case appear to argue that their fundamental interest in the right to vote is violated by § 9 of the home rule cities act and therefore, the classification must be closely scrutinized and may be upheld only if it is necessary for the furtherance of a state interest. Such a contention is without merit.

A similar contention was considered by the California Supreme Court in *Weber* v *City Council of Thousand Oaks,* 109 Cal Rptr 553, 513 P2d 601 (1973), where registered voters residing in "uninhabited territory" (defined by statute as territory in which less than 12 persons resided) were denied the right to vote on an annexation issue. The issue, as phrased by the Court, was "whether the inclusion or exclusion of any election as part of an annexation proceeding can justifiably be made to depend on the number of resident registered voters." 513 P2d at 607. The plaintiffs there alleged that it was unconstitu-

tional for the legislature not to have provided for an annexation election in the circumstances of that case, although providing for it in other circumstances. The *Weber* court held that the traditional (rational relationship) standard was applicable:

> "As the Legislature could constitutionally have provided that all annexations to cities be accomplished without a vote of the residents of the territory proposed to be annexed, and as the 1939 act provides for annexation without an election, the instant case involves no deprivation of or limitation on the fundamental right to vote calling for close scrutiny or justification on the basis of a compelling state interest." *Weber, supra,* 513 P2d at 608.

The court went on to hold that the classification in that case met the traditional equal protection standard.

In *Detroit Edison Co* v *East China Township School District No.* 3, 378 F2d 225 (CA 6, 1967), *cert den* 389 US 932 (1967), the plaintiffs sought, *inter alia,* a declaration that the annexation of two school districts to the school district in which they owned property violated the Fourteenth Amendment because they were denied the right to vote on the annexation proposal. At 378 F2d at 229 the court noted that the plaintiffs' reliance on "right to vote" cases was misplaced because such cases deal with the right to vote for candidates of one's choice in a representative government system, not with procedures for creating or altering any type of state district.

This conclusion is also supported by *Kramer* v *Union Free School District, supra,* wherein it is acknowledged that states have a great deal of latitude in determining whether certain questions are to be submitted to the voters. It is only after the franchise is granted the electorate that" ' . . . lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.' " *Kramer* v *Union Free School*

District, supra, p 629, quoting *Harper* v *Virginia Board of Elections,* 383 US 663, 665; 16 L Ed 2d 169, 171; 86 S Ct 1079 (1966).

Accordingly, the present situation is far different from that presented to this Court in *Gomillion* v *Lightfoot,* 364 US 339; 5 L Ed 2d 110; 81 S Ct 125 (1960). The facts of that case made it clear that the legislature "deprived the petitioners of the municipal franchise and consequent rights and to that end it has *incidentally* changed the city's boundaries." [Emphasis added.] This Court recognized:

> "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. . . ." *Gomillion, supra,* 347; 116.

In amplifying further on this concept, this Court more recently stated:

> "The equal protection principles applicable in gauging the fairness of an election involving the choice of legislative representatives are of limited relevance, however, in analyzing the propriety of recognizing distinctive voter interests in a 'single-shot' referendum. In a referendum, the expression of voter will is direct, and there is no need to assure that the voters' views will be adequately represented through their representatives in the legislature. . . ." *Lockport* v *Citizens for Community Action,* 430 US 259, 266; 51 L Ed 2d 313, 321; 97 S Ct —— (1977).

In the *Lockport* case, it is important to note the constitutionality of the state legislative enactment pertaining to the change of boundaries was upheld by this Court and that this Court cor-

rectly granted to the state statute the presumption of constitutionality to which every duly enacted state and federal law is entitled. *Lockport, supra,* 430 US at 272; 51 L Ed 2d at 325.

A number of jurisdictions have followed *Detroit Edison Co* v *East China Township School District No. 3, supra,* and the substantial authorities cited therein. For example, it was argued to the Supreme Court of Iowa that to allow a vote in the annexing city but deny it to the annexed territory constitutes a denial of equal protection because once having extended the vote to some in a certain situation, it cannot be denied to others in a different situation. That court disposed of the argument in these terms:

> "The United States Supreme Court [in *Hunter* v *City of Pittsburgh, supra*] has stated that municipal boundaries may be altered without the consent of the inhabitants of the territory affected and 'nothing' in the Federal Constitution is to the contrary." *City of Monticello* v *Adams,* 200 NW2d 522, 524 (Iowa 1972).

In precluding a referendum in those areas having one hundred or fewer residents, the legislature might have reasoned that the orderly growth of home rule cities should not be prevented by such a small segment of the population, or that the straightening of home rule city boundaries should not be prevented by a group of people less than one hundred in number. The legislature might have reasoned that an area having a population of one hundred or less does not have a major effect on a community when it is annexed to a city and detached from a township, whereas an area having over one hundred in population might have a major effect.

It is submitted that to the extent the equal protection clause does apply to annexation proceedings, the legislature has not acted arbitrarily in adopting the classification contained in this statute.

In concluding that the challenged classification of 100 or less bore a substantial relation to the object of the legislation here in question, the Michigan Supreme Court stated:

> "Some territory annexed will be sparsely populated or unpopulated while other territory will be more heavily populated. The challenged classification, responsive to that factual difference, tends to prevent venal abuses which there is reason to believe may occur if few persons (or a small group of persons) have absolute power to prevent an annexation economically advantageous to other persons or the community at large. See *Weber* v *Thousand Oaks City Council,* 9 Cal 3d 950; 109 Cal Reptr 553; 513 P2d 601 (1973), sustaining against an equal protection challenge a classification providing for a referendum if the area has more than 12 resident registered votes but dispensing with a referendum where there are fewer votes. It was not violative of the Equal Protection Clause to draw a line, and the line drawn (at 100) was not unreasonable." *Midland Township* v *Boundary Commission, supra,* p 667; 339.

This approach is not dissimilar to that found in *Adams* v *City of Colorado Springs,* 308 F Supp 1397, 1404 (1970) where it was said:

> "The law thus recognizes that a municipality such as Colorado Springs is severely handicapped by an annexation law which requires the approval of the property owners and qualified electors of an annexed area. It is unable to deal with groups of citizens who form small tax colonies on the borders of the core city which is the economic base of the urban area and to which the colonies owe their very existence and yet pay nothing for the advantages which the city provides. These people would seldom consent to the annexation and their nonconsent would threaten the very existence of the core city."

In the *Colorado Springs* case the classification there also was upheld as reasonable, and no violation of the Fourteenth Amendment of the Constitution in terms of inequality was found.

The State of Minnesota has a Municipal Commission which is analogous to Michigan's State Boundary Commission. When tested in federal court, it was concluded that the state's statute which authorized the Municipal Commission to order consolidation of a township and a city without approval of township residents did not deny them equal protection of the laws. The court noted that the Fourteenth Amendment prevents a state from manipulating its political subdivisions so as to defeat the federally protected rights; but absent any infringement of such rights, state governments have vast leeway in the management of their internal affairs. See *Doyle* v *Municipal Commission*, 340 F Supp 841 (1972) aff'd 468 F2d 620 (1972).

In view of the foregoing authorities, it is evident that the jurisdictional statement does not present any substantial federal question. It is so wanting in substance in view of the previous decisions of this Court that the question presented needs no further argument.

III.

CONCLUSION

WHEREFORE, Appellee State Boundary Commission respectfully submits that the jurisdictional statement presents no substantial federal question and that the question upon which this cause depends is so unsubstantial as not to need further

argument; and Appellee respectfully moves the Court to dismiss this appeal, or in the alternative, to affirm the order entered in the cause by the Michigan Supreme Court.

Respectfully submitted,

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